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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GARRY FRANK REYNOLDS, Defendant and Appellant.	A160770 (Contra Costa County Super. Ct. No. 51912005)

A jury convicted Garry Frank Reynolds of four counts of animal cruelty (Pen. Code,[1] § 597, subd. (b); counts 5, 6, 7, and 8 of the information). The court imposed a determinate prison term of two years for count 5, with concurrent terms of two years for counts 6, 7, and 8 respectively. Reynolds appeals, contending that the trial court erred in failing to stay the convictions on counts 6, 7, and 8 under section 654. We disagree and will affirm.

I. BACKGROUND

Reynolds was charged with eight counts of animal cruelty under section 597, subdivision (b), alleging cruelty against eight different dogs. Prior to trial, the People dismissed count 4. The evidence presented at trial on the remaining charges was as follows.

[1] Undesignated statutory references are to the Penal Code.

Reynolds owned and operated NorCal K-9, a dog training company that provided board-and-train services to customers seeking to have their dogs trained in areas such as obedience and aggression. When providing board-and-train services, NorCal K-9 would take custody of the customer's dog and assign it to a trainer for a certain period of time until the dog's training was complete. From 2015 to 2018, NorCal K-9 used various business locations in Byron, Antioch, and Tracy where its canine boarders lived and trained with their trainers.

One of NorCal K-9's dog trainers was Devon Ashby. Prior to his employment with NorCal K-9, Ashby had no previous experience in dog training. During his time working for NorCal K-9, Ashby earned between $300 and $500 a month. In addition to working for Reynolds, Ashby also lived with Reynolds in the several NorCal K-9 properties.

One day in May 2018, at a time when NorCal K-9 was operating its business out of a house and adjacent yard at 5200 Lone Tree Way in Antioch, Ashby discovered that Gunner, a German Shepherd in the company's board-and-train program, had passed away in his crate. After conducting an autopsy, a veterinary pathologist found indications that Gunner may have suffered from heatstroke.

At that time, Ashby lived mostly by himself in the Lone Tree Way house and was responsible for the care of the 13 to 14 dogs that were still there. Reynolds had recently moved out, having relocated to a house not far away. At some point, Ashby fell ill with an ear infection and the flu, which prevented him from maintaining and cleaning the house.

Prior to Reynolds's departure from Lone Tree Way, he hired a housekeeper who maintained the place twice a week, but those services ended after Reynolds moved out. By June, the property was in a decrepit

state, with rooms filled with boxes and clothes, and various people in the house whom Reynolds's housekeeper described as "drug users."

Prompted by questions surrounding the death of Gunner the German Shepard, Antioch Police Officer Thomas Lenderman went to the Lone Tree Way compound to investigate the "suspicious death of an animal." When he arrived, Officer Lenderman found kennels outside of the house that he described as "filthy" and "damaged." In addition, he saw garbage all around, including rotted chicken meat, a bird, flies, and ants.

When Officer Lenderman went inside, he stated the house was very warm, smelled of urine, and lacked air circulation. As he navigated his way around the house, Officer Lenderman entered a small 10-by-12-foot room containing nine kennels, with each kennel containing an animal. The room was described as smelling of ammonia and urine, was very warm, contained no air movement, and had dog hair and dander all over the floors. There was a rotting animal carcass in one kennel, and there were no food bowls or water bowls in the room or in any of the kennels.

Zeus, another German Shepherd that Officer Lenderman found, appeared to have missing skin in the front of his snout while the nose and the bridge of his mouth were inflamed. Another dog found in this room, Rambo the Goldendoodle, appeared to have missing hair. Officer Lenderman also found a Doberman named Gunner, who was so skinny that his ribs and bones could be seen. In the one month that Gunner stayed at Lone Tree Way, he lost 30 pounds, suffered hair loss, and developed rashes. Similarly, a Cane Corso named Favor was also found in one of the kennels and appeared to be malnourished and thin to the point that its ribs were visible.

The jury acquitted Reynolds on counts 1, 2, and 3, but found him guilty on counts 5, 6, 7, and 8 for violations of section 597, subdivision (b) as to four

specified dogs. At sentencing, the court imposed a middle term of two years for Reynolds's conviction of animal cruelty on count 5, with three concurrent middle terms of two years for his convictions of animal cruelty on counts 6, 7, and 8.

II. DISCUSSION

Here on appeal, Reynolds contends the terms imposed for his animal cruelty convictions in counts 6, 7, and 8 must be stayed pursuant to section 654 because the commission was based on a single course of conduct not divisible as to each animal. We conclude the trial court was correct to rule that section 654 does not apply.

Section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions, but in no case shall the act or omission be punished under more than one provision." In other words, section 654 serves to prevent multiple punishment of a defendant "by staying execution of sentence on all but one of those convictions." (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

Logically, it follows that section 654 is only applicable in instances where multiple statutory violations arise from a single course of conduct. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252.) To determine whether a course of criminal conduct is divisible, courts have traditionally relied on the test put forward in Justice Traynor's opinion for the California Supreme Court in *Neal v. State of California* (1960) 55 Cal.2d 11, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334, 344 (*Correa*). Under the *Neal* test, a court determines if a course of conduct is divisible based on the "intent and objective of the actor." (*Neal*, at p. 19.) If all of the offenses

were incident to one objective, the defendant may be punished for one of such offenses but not for more than one. (*Ibid.*)

As formulated and explained in *Neal*, this intent-based test was accompanied by dicta in a footnote stating that, "Although section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the same Penal Code section or to multiple violations of the criminal provisions of other codes, it is settled that the basic principle it enunciates precludes double punishment in such cases also." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 18, fn. 1 (footnote 1).) With the proliferation of so many overlapping offenses and so many sentencing enhancements in the Penal Code as it evolved over time, thus increasing the potential in a given case that multiple "criminal provisions of other codes" (*ibid.*) would cover the same course of conduct, footnote 1 eventually gave rise to a good deal of controversy, and eventually, calls to overturn *Neal*.

Doubts about the continuing viability of *Neal* and the "gloss" placed upon it by footnote 1 first arose in *People v. Latimer* (1993) 5 Cal.4th 1203, 1210–1211, more than three decades after *Neal* was announced. There, the Supreme Court acknowledged "some merit" to criticisms of *Neal* (*id.* at p. 1211), largely on grounds articulated in Justice Schauer's concurrence and dissent in *People v. McFarland* (1962) 58 Cal.2d 748, 763–784, which argued that *Neal*'s "intent and objective" test "has seemingly been interpreted as license to indulge at the appellate level in unbridled speculation as to the scope and content of the criminal's 'objective.' " (*Id.* at p. 769.) Justice Schauer argued that, "The inevitable effect of this gratuitous ruling will be to create a bargain era for criminals: any number of crimes can be committed for the price of one, provided only that all be included in 'the intent and objective of the actor.' " (*Id.* at p. 767.) Ultimately, however, the *Latimer*

court declined to overturn *Neal*, invoking stare decisis. (*Latimer*, *supra*, at pp. 1212–1216.)

When the *Latimer* court wrote in the early 1990's, many years had passed since *Neal* was decided, and in the interim the Legislature, while never expressly endorsing *Neal*, had enacted a great deal of subsequent penal legislation in reliance on it. As a result, the court concluded that *Neal* "can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court." (*Latimer*, *supra*, 5 Cal.4th, at p. 1216.) Nearly two decades after *Latimer*, the court in *Correa*, *supra*, 54 Cal.4th 331, once again entertained an invitation to overrule *Neal*, canvassing essentially the same set of concerns that the *Latimer* court addressed, but this time in a case posing the narrower question whether footnote 1 of *Neal* was still good law in a case involving multiple violations of the same statute. (*Correa*, at p. 337.) The court reaffirmed the holding in *Latimer* that stare decisis compels continued adherence to the holding in *Neal* (*id.* at p. 336), but expressly disapproved the "gloss" offered in footnote 1 (*id.* at pp. 338, 344).

Today, the net takeaway from this history is that Justice Traynor's opinion in *Neal* remains firmly embedded in law as the lodestar section 654 case governing our analysis, subject to the caveat announced in *Correa* that footnote 1 has been overruled.

Turning to the applicable standard of review, "[t]he question of whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113; see *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) "Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*DeVaughn*, at p. 1113.) Furthermore, the court's findings

may be express or implied. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.) Here they are express. But if the issue gravitates around the meaning of section 654, courts must interpret the statute as a legal question through a de novo lens. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.) The dispositive question presented in this case turns on an interpretation of section 654. We therefore decide it de novo.

Applying these principles to the record here, we must first identify the acts which correspond to the punishments imposed on Reynolds. As we read the record, Reynolds was convicted on counts 5, 6, 7, and 8, all of which were for violations of the same animal cruelty statute (§ 597, subd. (b)). For each of these convicted counts, the jury found Reynolds guilty of animal cruelty inflicted upon a different dog in the Lone Tree Way compound. In count 5, Reynolds was found guilty of animal cruelty to Gunner the Doberman; in counts 6, 7, and 8, respectively, Reynolds was found guilty of animal cruelty to Favor the Cane Corso, Zeus the German Shepherd, and Rambo the Goldendoodle.

At sentencing, the trial court overruled defense counsel's objection that counts 6, 7, and 8 should be stayed pursuant to section 654. In explaining its ruling, the court used the analogy that if one were to commit a robbery where there were four clerks present, then that person has committed four robberies. Consequently, the trial court refused to stay the other counts, counts 6, 7, and 8. While we question whether the judge's robbery analogy was aptly phrased—it appears to describe a situation in which there was one robbery victim and four witnesses—we conclude that the ruling was nonetheless correct.

Although the Attorney General does not argue for affirmance on this ground, we believe the issue before us is rooted in footnote 1 in *Neal*, the

same footnote the *Correa* court rejects. (*Correa*, *supra*, 54 Cal.4th at p. 344.) In his opening brief, Reynolds contends that, although section 654 by its terms only bars multiple punishment for a single act violating more than one statute, it has also been interpreted to preclude punishment for more than one violation of a single Penal Code section, if the violations all arise out of a single criminal act or course of conduct. For this proposition, he relies on a series of pre-*Correa* cases as well as footnote 1 of *Neal*. He then goes on to address an exception to the general rule where, even if the defendant engages in a single course of conduct under the *Neal* test, he may still be punished for separate offenses committed against multiple victims. Under this exception to section 654, a criminal defendant who has committed one act of violence affecting two or more people may be punished separately for each crime. (*People v. Newman* (2015) 238 Cal.App.4th 103, 112.) But the multiple victim exception does not apply here, Reynolds argues.

The premise of this argument—that the general rule of section 654 applies, necessitating resort to an exception—is incorrect. Reynolds was convicted of multiple violations of the same animal cruelty statute (§ 597, subd. (b)), in other words, multiple violations of the same provision of law. Whether the situation is a defendant robbing four clerks by forcibly taking money from each one at the same time, possessing seven firearms found in one closet, or negligently caring for four dogs found in the same room, section 654 may not be applied to preclude separate punishments for each crime committed when the convictions are for violations of the same provision of law. If section 654 were applied in this situation, a defendant committing animal cruelty against one dog could thereafter with impunity harm as many dogs as he wished, as long as he kept all the dogs in one place during his arrest. (*Correa*, *supra*, 54 Cal.4th at pp. 342–343.) Under *Correa*, such a

result is one that "clearly contravenes express legislative intent." (*Id.* at p. 343.)

Although the parties present extensive arguments about whether the multiple-victim exception applies, it is unnecessary for us to address the issue they invite us to decide: "Can a dog be a 'victim' for purposes of the section 654 multiple-victim exception?" Interesting though that question may be, under the holding in *Correa* "section 654 does not bar multiple punishment for violations of the same provision of law." (*Correa*, *supra*, 54 Cal.4th at p. 344.) Here, all four counts of conviction rest on violations of the same provision of law, section 597, subdivision (b). The trial court imposed the middle term of two years for count 5. For counts 6, 7, and 8, the court imposed the middle term of two years to be served concurrently for each count, and ruled that section 654 does not require these concurrent terms to be stayed. Under *Correa*, this ruling is correct. Because section 654 does not apply at all, there is no need to decide whether the multiple-victim exception applies.

III. DISPOSITION

The judgment of the trial court is affirmed.

STREETER, J.

WE CONCUR:

POLLAK, P. J.
BROWN, J.